No. _____

In The
Supreme Court of the United States

BILLY D. STAIR, individually, and in his official capacity with the Jacksonville Police Department,

Petitioner,

vs.

CHARLES JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During a detention, respondent Charles Jackson attempted to strike an officer who was handcuffing him, causing petitioner Billy D. Stair to deploy a Taser, activating it three times in nineteen seconds before Jackson ceased resistance. The district court granted summary judgment to petitioner, finding the force reasonable under the Fourth Amendment. The Eighth Circuit reversed, 2-1. The majority held that while the first and third activations were reasonable as a matter of law, a jury could find the second to be excessive. The dissent agreed with the district court judge, that all three activations were reasonable, noting that Jackson's "momentarily supine position on the ground was hardly a guarantee of a no-longer aggressive subject. . . ."

The questions presented by this petition are:

1. Did the Eighth Circuit depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014) in denying qualified immunity to petitioner based upon the absence of a constitutional violation by assessing the reasonableness of each of three Taser activations over a nineteen second period, instead of assessing the reasonableness of petitioner's conduct in light of the totality of the circumstances?

2. Did the Eighth Circuit depart from this Court's decision in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam) and numerous other cases by denying qualified

QUESTIONS PRESENTED—Continued

immunity even though two judges concluded the use of force was reasonable, and notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting petitioner?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Billy D. Stair, an individual, defendant and appellee below, and petitioner here;
- Charles Jackson, plaintiff and appellant below and respondent here; and
- The City of Jacksonville and Jacksonville Police Department were defendants in the district court and appellees in the Eighth Circuit and jointly represented by counsel for petitioner Stair.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- United States District Court, Eastern District of Arkansas, Western Division, Case No. 4:16CV00533 SWW, *Charles Jackson v. Billy Stair, III, City of Jacksonville and Jacksonville Police Department*, judgment entered March 12, 2018.
- United States Court of Appeals, Eighth Circuit, Case No. 18-2617, *Charles Jackson v. Billy Stair, III, City of Jacksonville and Jacksonville Police Department*, opinion and judgment entered December 3, 2019.

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The district court's March 12, 2018 order granting summary judgment to petitioner is not reported, and is reproduced in the appendix to this petition ("Pet. App.") at pages 34-47. The Eighth Circuit's initial September 12, 2019 opinion reversing the judgment in part is published, *Jackson v. Stair*, 938 F.3d 966 (8th Cir. 2019), and is reproduced in the appendix at pages 19-31. The Eighth Circuit's December 6, 2019 and December 9, 2019 orders vacating the initial opinion and granting petitioner's initial petition for rehearing are not published and are reproduced in the appendix at pages 56-58. The Eighth Circuit's December 3, 2019 amended opinion is published, *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019), and is reproduced in the appendix at pages 1-18. The Eighth Circuit's March 26, 2020 order denying rehearing en banc and Judge Colloton's dissent from denial of rehearing en banc are published, *Jackson v. Stair*, 953 F.3d 1052 (8th Cir. 2020), and are reproduced in the appendix at pages 49-55.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Eighth Circuit's December 3, 2019 decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed per the Court's March 19, 2020 order extending the time to file any petition to 150 days after denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioner violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Background Of The Action.

On July 23, 2013, Jacksonville Police Department officers were dispatched to a dispute in progress at a local business, Vaughn Tire. (Pet. App. 2.) Respondent Jackson believed that Vaughn Tire had damaged a wheel lug during the course of a repair of Jackson's dump truck. (*Id*.) Petitioner Billy Stair was the first officer to respond on the scene and found Jackson walking with another man. (Pet. App. 2-3.) Stair asked, "What's going on guys?" (Pet. App. 3.) Jackson was quite agitated, and began to yell and point toward another group of men. (*Id*.) Stair instructed Jackson to relax, and Jackson replied, pointing at one of the men, "Get him, and I'm gonna relax." (*Id*.) Officer Stair told Jackson to go stand by the patrol car. (*Id*.) Jackson began to comply, still yelling, when Officer Stair told him to keep his hands out of his pockets. (*Id*.) Jackson reached his left hand into his pocket and stopped immediately in front of Stair, shouting that he did not have anything in his pockets. (*Id*.) Stair ordered Jackson to turn around, but Jackson got louder and did not comply. (*Id*.)

Stair pulled out his Taser, pointed it at Jackson, and again ordered Jackson to turn around, or he would be tased. (*Id*.) Jackson continued to yell and point, at

one point shouting: "You tase me and see what happens." (*Id*.) Five more times Stair ordered Jackson to turn around before Jackson finally began to comply. (*Id*.) Stair told Jackson to put his hands up, and he did, but was still facing Stair. (*Id*.) Stair again ordered Jackson to turn around, and Jackson did so with his hands in the air, but continued to shout, asking for Stair's badge number and threatening to file a complaint with his supervisor. (*Id*.; Taser Video: 00:32-00:41.)[1]

Officer Kenneth Harness arrived, approached Jackson and attempted to handcuff him. (Pet. App. 4.) Jackson put his hands behind his back, stating: "Don't hurt my arm." (*Id*.) Jackson turned around to face Harness and raised his right fist toward the officer's head. (*Id*.) Stair immediately deployed and activated his Taser, and Jackson fell to the ground, kicking his legs. (*Id*.; Taser video: 00:45-00:50.) Moments later, and without another warning, Stair activated his Taser a second time for approximately three seconds. (*Id*.; Taser video: 00:52-00:56.) Stair twice ordered Jackson to turn on his stomach or he would be tased, but Jackson rose to one knee, in the direction of Stair. (*Id*.) Stair deployed his Taser a third time and Jackson finally complied with the order to lie on his stomach. (*Id*.; Taser video: 00:59-01:04.) The three Taser cycles

[1] The Taser was equipped with a video camera, and the recording along with the dash camera video were submitted as exhibits 3 and 4 to defendants' Statement of Uncontested Material Facts in the district court (Dkt. No. 25), and referenced by the Eighth Circuit in its opinion (Pet. App. 3 n.1). References are to the time counter for the video.

occurred over a period of nineteen seconds, with roughly six seconds between the first and second activations. (Taser video: 00:45-01:04.) Officer Harness handcuffed Jackson and Jackson was arrested for disorderly conduct. (Pet. App. 4.)

B. The Lawsuit.

Jackson filed a complaint under 42 U.S.C. § 1983 against Officer Stair, in his individual and official capacities, the City of Jacksonville, and the Jacksonville Police Department, alleging that his constitutional rights were violated during the tasing incident. (Pet. App. 4.)[2]

Defendants moved for summary judgment. The district court granted the motion for summary judgment, concluding with respect to the excessive force claim against Stair that the use of force was reasonable:

> The undisputed evidence shows that Stair attempted to subdue Jackson with verbal commands and warnings, but to no avail. Jackson remained loud and confrontational during the entire incident. He refused to follow instructions, he put his hand in his pocket after Stair instructed him otherwise, and he raised his arm and hand toward Harness. Faced with these circumstances, a reasonable officer in Stair's position would reasonably perceive

[2] Jackson also asserted state claims that are not relevant to this petition.

> that the extent of force employed was reasonably necessary.

(Pet. App. 41-42.)[3]

Jackson appealed. In a 2-1 decision, the Eighth Circuit affirmed in part and reversed in part. (*Id*. at 20.) The majority affirmed the district court as to the majority of claims, but found that plaintiff should proceed to trial on whether the second of the three activations of the Taser constituted excessive force—the majority agreeing with the district court that the first and third activations were reasonable. (*Id*. at 29-30.) Judge Wollman dissented in part, noting he would find the second activation of the Taser to be reasonable:

> When viewed in light of his earlier manifestation of unceasing, rage-filled verbal and physical conduct, Jackson's momentary post-tasered position on the ground does not justify considering it as a clearly punctuated interim of compliance with Officer Stair's earlier commands, and thus the second tasing was not objectively unreasonable. Granted that Jackson had not at that point attempted to rise from the ground, his earlier-expressed threatened use of force against Officer Harness, when coupled with the nearly hysterical tone of his voice throughout his interaction with Stair and others nearby, justified the continued application of the Taser. It may appear from our chambers-viewed observation of the entire

[3] The district court also granted summary judgment as to Jackson's wrongful arrest and First Amendment retaliation claim against Stair, and as to the state law claims. (*Id*. at 40-44.)

> encounter to have been a too-hasty application, but given Jackson's earlier pretasing arm-waving, rant-filled anger and his reluctance to comply with Stair's several earlier-expressed commands and warnings, his momentarily supine position on the ground was hardly a guarantee of a no-longer aggressive subject. . . .

(*Id*. at 30.)

Stair petitioned for rehearing, and the court granted rehearing (*id*. at 56-58), but on December 3, 2019 the court issued an amended 2-1 opinion, again reversing on the ground that there was an issue of fact whether the second Taser deployment was reasonable, and that Stair was not entitled to qualified immunity because existing case law put him on fair notice that use of the Taser against Jackson might give rise to liability (*id*. at 11-17). Judge Wollman again dissented. (*Id*. at 17-18.)

Stair petitioned for rehearing en banc, and on March 26, 2020, the Court denied the petition, with Judges Colloton and Loken dissenting. (*Id*. at 49-55.) Judge Colloton observed that the panel opinion did not cite any analogous case law finding a constitutional violation from deployment of a Taser in similar circumstances. (*Id*. at 53-55.) He noted that two judges, the district court judge and Judge Wollman, had found the second Taser deployment to be reasonable, and so it could not be said that Stair was "plainly incompetent" or "knowingly violating the law" in believing the second Taser deployment to be reasonable. (*Id*. at 50.)

Judge Colloton submitted that en banc review was necessary to bring the Circuit into compliance with this Court's decisions concerning qualified immunity. (*Id*. at 55.)

REASONS WHY CERTIORARI IS WARRANTED

This Court has repeatedly recognized the importance of qualified immunity in assuring that law enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. Most recently, in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017) (per curiam*), Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), and *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case. The Court has stressed the need to "identify a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. As the Court held in *Kisela*, in use of force cases "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." 138 S. Ct. at 1153.

Here, as Judges Colloton and Loken noted in dissenting from the denial of rehearing en banc, the Eighth Circuit departed from this controlling principle. The

panel majority opinion identifies no case involving use of a Taser under similar circumstances, i.e., an actively combative suspect prompting critical use of force decisions over an extremely short period of time—nineteen seconds. Instead, as Judges Colloton and Loken observed, the panel majority simply cited case law standing for the highly generalized proposition that using a Taser on a compliant suspect constitutes excessive force. This is exactly the approach this Court rejected in *Emmons, Kisela* and a score of other cases.

Indeed, the panel majority's entire analysis of the use of force issue is premised on the very sort of leisurely second guessing of split-second decisions made under tense, rapidly evolving circumstances that this Court rejected in *Graham v. Connor*, 490 U.S. 386 (1989). Rather than focusing on the totality of circumstances confronted by the officer on the scene as *Graham* commands, the majority analyzes each Taser activation separately, breaking a chain of split-second decisions into individual components, each of which is evaluated for "reasonableness." The result is a scenario that bears little relationship to the actual circumstances in which officers must make life or death decisions, and fosters the very sort of Monday morning quarter-backing that *Graham* intended to foreclose. The problem is particularly acute in the context of Taser use, where the nature of the force itself—a single deployment, but with potential for multiple activations—routinely leads courts to assess each activation without regard to the totality of circumstances that prompted use of force in the first place.

This case underscores the need for the Court to clarify application of the totality of circumstances test in the context of one of the most commonly employed applications of force, and to reaffirm *Graham*'s guiding principle that use of force be analyzed with full appreciation of the tense, rapidly evolving circumstances confronting officers in the field. Both the district court and Judge Wollman in dissenting from the panel opinion recognized that given the totality of circumstances confronted by Stair—an agitated and ultimately actively combative suspect, as well as the highly compacted, nineteen second time frame in which the use of force decisions had to be made—the three Taser activations were reasonable under *Graham*.

Moreover, as Judges Colloton and Loken observed in dissenting from denial of rehearing en banc, the fact that two of the four judges to have analyzed the case believed the use of force was reasonable compels application of qualified immunity. This Court has made it clear that qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Where two respected judicial officers, with time for reflection and careful consideration of the facts confronting Stair, believed the use of force was reasonable, how can Stair be said to be "plainly incompetent" or "knowingly violating the law" when making the same determination while confronting a split-second need to react?

Under this Court's controlling authority, the Eighth Circuit panel majority was not free to ignore salient facts relevant to assessing the reasonableness of Stair's conduct or abdicate its responsibility to identify pertinent case law imposing liability under substantially similar facts before rejecting qualified immunity.

Under this Court's governing authority, Stair was entitled to summary judgment on the excessive force claim and review is necessary to secure adherence to the decisions of this Court, and to confirm the wide latitude officers have in making split-second decisions when confronting combative individuals in the field.

I. REVIEW IS NECESSARY TO ADDRESS *GRAHAM*'S TOTALITY OF CIRCUMSTANCES TEST IN THE CONTEXT OF TASER DEPLOYMENT, WHERE AN ONGOING COURSE OF COMBATIVE RESISTANCE MAY REQUIRE SEVERAL DISCRETE TASER ACTIVATIONS.

A. As The Eighth Circuit Opinion Underscores, There Is Confusion Concerning Application Of *Graham*'s Totality Of Circumstances Standard To Excessive Force Cases Involving Tasers, Where A Single Deployment May Involve Multiple Applications.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that claims for excessive force under the Fourth Amendment must be evaluated based upon the

objective reasonableness of an officer's conduct. *Id*. at 395-97. That evaluation "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). Critically, the Court has emphasized that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

As the Court emphasized:

> The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "*Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment.*

Id. at 396 (citations omitted, emphasis added).

The Eighth Circuit panel majority departed from those principles here. Instead of evaluating the three Taser activations over a nineteen second period in light of the *totality* of circumstances, i.e., plaintiff's initial and continued physical resistance and lack of compliance with lawful officer commands, the majority instead parsed each activation separately. In doing so, as the dissenting opinion noted, the majority lost sight of the forest for the trees. It transformed what, to a reasonable officer under *Graham*'s "tense, uncertain, and rapidly evolving" circumstances standard could appear to be (and was) only a "momentary" suspension of combat, into "a clearly punctuated interim of compliance," sufficient to render the second activation potentially unreasonable. (Pet. App. 17.)

The result is a purported unreasonable use of force sandwiched between two manifestly reasonable applications of force all within a span of seconds. Yet, this is exactly the sort of second-guessing untethered to real

world rapidly evolving circumstances that the *Graham* standard was designed to foreclose.

Where, as here, the application of force occurs in the context of a highly compacted time frame, the totality of circumstance standard necessarily requires that a court not evaluate each use of force as subject to a separate constitutional inquiry, divorced from what preceded and followed. The tendency to focus on individual applications of force, as opposed to the circumstances surrounding the use of force, is particularly acute in the context of Taser deployment. Because a Taser may be activated several times over the course of deployment, courts often focus on each activation as subject to Fourth Amendment analysis. *See*, *e.g.*, *De Contreras v. City of Rialto*, 894 F. Supp. 2d 1238, 1255-56 (C.D. Cal. 2012); *Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137 (W.D. Wash. 2007); *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1167 (E.D. Cal. 2008); *Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077 (N.D. Cal. 2011). But again, where, as here, activation occurs over an extremely short time period in response to ongoing resistance, parsing each activation separately makes no sense, and unduly premises potential liability not on the totality of circumstances, but on isolated instances within the course of events.

Requiring courts to focus on the totality of circumstances prompting the use of force, and not each individual use of force, more closely adheres to *Graham*'s standard than an act-by-act analysis of an officer's action. Moreover, it is a neutral formula that does not unduly favor one party or another.

For example, in *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016), the court reversed the district court's order granting qualified immunity to an officer for three Taser applications where the third was arguably justifiable. The court observed that the last activation could not be divorced from the improper officer misconduct that preceded, and indeed may have prompted it, noting that a jury could conclude that the plaintiff was essentially tased three times for not having a license. *Id*. As the court noted, "we have cautioned courts against using 'a segmented view of the sequence of events' where 'each distinct act of force becomes reasonable given what [the officer] knew at each point in th[e] progression.'" *Id.* (citing *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994)).

Indeed, as the court noted in *Rowland*:

> The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness.

41 F.3d at 173.

In *Martin v. Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987), the court rejected a formulaic assessment of each application of force within a single, temporally brief event, and applying a totality of circumstances test found the overall application of force reasonable, even

if minor transgressions may have occurred as part of the whole:

> Tested by the standard confirmed in *Garner*, we are unable to characterize the *manner* in which Malhoyt arrested Martin as objectively unreasonable in light of the rapidly unfolding sequence of events. Slamming the car door on Martin's leg causes us to pause, for that action appears malicious. But under *Garner*'s objective test, maliciousness is irrelevant. We must focus on whether Malhoyt's *total conduct, objectively appraised, added up* to a reasonable mode of arrest. We conclude that it did. Even the door slamming, given the apparent need for instant action, does not appear to be an extraordinary response. In sum, viewing the "totality of the circumstances," we cannot conclude that Malhoyt used unreasonable force in taking immediate steps first to confine Martin to his vehicle, then to effect his arrest.

830 F.2d at 262 (second emphasis added).

As noted, the need to focus on the totality of circumstances is particularly acute in the context of cases involving deployment of a Taser, where the temptation is for courts to focus on justification for each activation, no matter how compacted the time period in which deployment occurs. This approach departs not only from *Graham*'s command to evaluate use of force in light of the totality of circumstances, but from the Court's admonition not to discount the split-second nature of decision-making by officers confronted with "tense,

uncertain, and rapidly evolving" circumstances. 490 U.S. at 397.

This Court has not expressly addressed *Graham* in the context of Taser use, nor the scope of what constitutes the totality of circumstances pertinent to the excessive force inquiry under *Graham*. Given the ubiquity of Tasers as a basic tool of law enforcement, and the varying approaches courts have taken in assessing what constitutes the "totality" of circumstances, it is necessary that this Court grant review to provide guidance on these fundamental, recurring issues. Moreover, as we discuss, application of the *Graham* standards in this case compels the conclusion that petitioner's use of force was proper.

B. The Undisputed Evidence Correctly Interpreted In Light Of *Graham*'s Totality Of Circumstances Standard Establishes That The Use Of Force Against Respondent Was Proper.

This Court has recognized that where the undisputed evidence establishes that the force used was objectively reasonable, an officer is entitled to summary judgment. *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014); *Scott v. Harris*, 550 U.S. 372, 386 (2007). Petitioner submits that is the case here.

As both the district court and dissenting Judge Wollman concluded, review of the Taser video of the incident establishes that Stair's use of force was reasonable under *Graham*. The struggle with Jackson

occurred over an extremely brief, but tense, period of time and against the background of Jackson's highly agitated state from the very outset of his encounter with the officers. As the panel majority concedes, even after the Taser was activated a second time, Jackson attempted to attack the officers, moving towards Stair in a manner the majority acknowledges could reasonably prompt the use of force to forestall a perceived assault. At no point prior to the third Taser activation did Jackson cease moving or resisting for any meaningful interval of time, nor in any other way signal his acquiescence to the officers' commands.

An officer in the field confronted with an agitated suspect actively engaged in physically resisting arrest—indeed assaulting a fellow officer—does not have the luxury of assuming that a momentary cessation of outright attack during a course of assaultive behavior signals full blown surrender. As the majority acknowledges, in a nineteen second period Jackson twice engaged in assaultive behavior amply justifying use of force under *Graham*. The notion that some momentary pause renders one instance among several applications of force during the entire course of an event improper departs from *Graham*'s real-world standards and threatens the safety of law enforcement officers performing their duties, at great physical hazard.

Given Jackson's entire course of conduct, under *Graham*'s totality of circumstances standard, petitioner Stair's use of force was manifestly reasonable, and he is entitled to judgment on the excessive force claim.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *KISELA V. HUGHES* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split-Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) (per curiam). It assures that officers, when confronted with uncertain circumstances,

may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" 457 U.S. at 814. Those concerns are magnified in the context of use of deadly force, whereby definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, this Court has repeatedly issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id*. at 552.

In Kisela v. Hughes, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id*. at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. *Id*. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id*. With the knife-wielding woman only six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the woman refused commands to drop the knife, the officer fired and wounded her. *Id*.

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly

fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id*. at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Id. at 1153 (citing *Mullenix*, 136 S. Ct. at 309, 312).

In *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court again reversed the denial of qualified immunity to an officer where the Circuit court had defined the right at issue at too high a level of generality, and had failed to identify any case involving similar facts that would put an officer on notice that his or her conduct could give rise to liability. In *Emmons*, an officer sought entry into a residence to conduct a welfare check for reported domestic abuse. *Id.* at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id.* at 502.

In denying qualified immunity, the Ninth Circuit simply stated: "'The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).'" *Emmons*, 139 S. Ct. at 502. This Court noted that such a generalized statement of the law was improper, this was a case involving active resistance to an officer and that "the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case." *Id*. at 503-04.

The Court emphasized that this "was a problem under our precedents":

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . ." [*District of Columbia v.*] *Wesby*, 583 U.S. at ___, 138 S. Ct. [577], at 581 [(2018)] (internal quotation marks omitted).

Emmons, 139 S. Ct. at 504.

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the Court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. *White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, similarly justify this Court's intervention in this case. When qualified immunity is improperly denied, the "social costs" outlined in *Harlow* fall disproportionately on officers. It is necessary for the Court to grant review because the Eighth Circuit's rejection of qualified immunity was flatly improper and departed from the controlling decisions of this Court.

B. No Clearly Established Law Put Petitioner On Notice That His Use Of Force Might Violate The Fourth Amendment.

As noted, this Court has repeatedly admonished the lower appellate courts that other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the

specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix*, 136 S. Ct. at 309); *White*, 137 S. Ct. at 551. Here, no existing precedent squarely governs the facts confronted by petitioner Stair so as to put him on notice that his use of force might be deemed improper under the Fourth Amendment.

As the dissent from denial of rehearing en banc notes, the panel majority did exactly what this Court decried in *Emmons*—defined the underlying right at a high level of generality, i.e., the right to be free of excessive force, and held that cases involving use of force against unresisting suspects generally were sufficient to give petitioner fair warning that his use of force under the particular facts of this case could give rise to liability for purposes of denying qualified immunity. (Pet. App. 53 (citing opinion at Pet. App. 15-16).)

Yet, assuming one must look at Eighth Circuit law to determine whether the law was clearly established with respect to petitioner's use of force for purposes of qualified immunity (an issue the Court has left open)[4],

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[4] This Court has noted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *District of Columbia v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 591 n.8 (2018); *see also Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be "dispositive source[s] of clearly established law"); *Emmons*, 139 S. Ct. at 503 (assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity).

the relevant case law makes it clear that qualified immunity is appropriate.

Certainly none of the cases the panel opinion cites as rendering the law clearly established bear any similarity to this case. As Judges Colloton and Loken noted in dissenting from the denial of rehearing en banc, none concerned a closely analogous factual situation as required by this Court's decision such as *Kisela* and *Emmons*, nor did the majority even recite the applicable standards set by those cases. (Pet. App. 51-54.)

Indeed, *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010) and *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012) did not even involve use of a Taser. In both cases the court found an issue of fact whether a leg sweep takedown of an unarmed, compliant suspect was excessive force. *Shannon*, 616 F.3d at 858; *Montoya*, 669 F.3d at 869.

Smith v. Conway County, 759 F.3d 853 (8th Cir. 2014) is an Eighth Amendment case involving a Taser deployed as "corporal inducement" against a nonviolent detainee who was in pain, seeking medical assistance, and attempting to comply with a jailer's orders. *Id*. at 860. *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012) addressed an officer's use of a Taser against a compliant, nonviolent, nonfleeing misdemeanant after the officer unsuccessfully sought to handcuff the suspect and the two men accidentally fell to the ground. *Id*. at 366-67. *Brown v. City of Golden Valley*, 574 F.3d 491, 496-97 (8th Cir. 2009) held that

use of a Taser against a seat-belt restrained passenger cowering in her automobile was unreasonable.

As Judge Colloton noted, none of the cases comes close to addressing the question at issue here, i.e., "whether the Fourth Amendment forbids two five-second deployments of a Taser to subdue a rage-filled subject who threatens force against an officer." (Pet. App. 54.) In sum:

> The panel opinion cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer, and no decision holding that a subject's "momentary post-tasered position on the ground" requires an officer to consider it "a clearly punctuated interim of compliance" that makes another use of the taser unreasonable under the Fourth Amendment.

(*Id*. at 53.)

Application of this Court's requirement for factual specificity in the context of excessive force claims makes it clear that Stair is entitled to qualified immunity. There was no Eighth Circuit case remotely suggesting that activation of a Taser three times in nineteen seconds against a non-compliant suspect could constitute excessive force.

Indeed, as Judge Colloton observed, given that two of the four judges who have analyzed the use of force here concluded that it was reasonable as a matter of

law, it cannot seriously be contended that the issue is "beyond debate" or that Stair was "plainly incompetent" or "knowingly violat[ing] the law." (Pet. App. 49-50 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).)

Under the decisions of this Court, the Eighth Circuit was required to grant petitioner qualified immunity. It is therefore necessary for the Court to grant review to compel compliance with precedent, and reinforce the important public policies served by qualified immunity.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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